In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1253

WILLIAM S. AND MARY P. SERRI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In this case the Tax Court, on the basis of detailed findings which rested largely on stipulated facts (R. 123a–143a),[1] held that from 1947 to 1956 (except for 1948) the petitioners fraudulently had understated their taxable income by $240,000, and upheld the Commissioner's assessment of deficiencies and fraud penalties. The material facts, as found by the Tax Court, are as follows:

[1] "R." refers to the appendix to the petitioner's brief, and "Supp. R." to the appendix to the Commissioner's brief, in the court of appeals.

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During the years involved petitioner William Serri [2] engaged in the general practice of medicine in New Jersey; he maintained offices in Swedesboro, a farming community, and Camden, an industrial city (R. 124a). Petitioner generally made no appointments and conducted his practice on a cash basis at low average fees (R. 125a; Supp. R. 46b). His practice was so large that at one of his offices patients upon arrival were given numbers which determined the order in which he saw them; patients arrived as early as 5 A.M. to get their numbers (R. 125a). Petitioner opened his office between 7 and 8 A.M., and saw patients until approximately 12:30 at night (R. 126a). He sometimes worked until 1:30 or 2:30 in the morning; he worked nine hours on Saturday and worked on holidays; other than occasional days off, he took no vacations (R. 126a). He took short rests during the day, and travelled the relatively short distance between his offices (R. 126a). Petitioner averaged at least 14 hours per working day; it was stipulated that he worked the equivalent of 275 full days a year (R. 126a).

The Tax Court found (R. 157a) that petitioner's records were "totally inadequate." Petitioner maintained two types of professional records. He kept cards for individual patients, which did not show any fees; many of these cards were lost (R. 127a). He also had a bookkeeping system which showed only the purported total fees received each day, but without

[2] Petitioner Mary Serri, William Serri's wife, is in the case only because the petitioners filed joint returns. We shall refer to William Serri as the petitioner.

any breakdown; in many instances the daily total had been changed (R. 126a; Ex. U, Supp. R. 150b–162b). The Commissioner computed petitioner's income for the years in question by the net worth method; the net worth computation, set forth in the Tax Court's findings (R. 132a–133a, 142a–143a), shows that during the years involved petitioner purchased antiques and art objects in the total amount of $240,000 more than his reported income.[3]

Petitioner's defense was that the money spent for those objects came from a hoard of cash that his family had accumulated and had turned over to him in 1944. Petitioner had not made this contention until more than a year after the Service had begun its investigation of his tax returns; at the earlier stages of the investigation he contended that the funds used to make the purchases were his own (R. 127a, 130a–131a, 149a–150a, 156a; Supp. R. 88b).

The Tax Court discussed in detail the evidence relating to this claim (R. 129a–130a, 134a-141a, 148a–157a). It concluded that the Serri family "did not accumulate a large cash hoard during [petitioner's father's] life * * *" (R. 144a); and that Serri "never became the custodian of any substantial amount of family funds, and the money he spent through the years for art objects and antiques was his own" (R. 153a). The court stated that, based upon its observance of petitioner's demeanor, he was "evasive and lacking in candor" and that his testimony about the

[3] The total net income that taxpayer reported was insufficient to pay his stipulated living expenses during those years (R. 131a–133a, 142a–143a).

family cash hoard "very definitely lacked a trustworthy ring"; and that his assistant "did not appear to be completely candid in her testimony" (R. 155a).[4] The court stated that "[i]t does not seem plausible" that petitioner's father, on a total annual family income which never exceeded $5,000 to $6,000, could have supported his mother, his wife, two sons and himself "and at the same time accumulate over $250,000" (R. 149a)[5]; that there was no record of any federal estate tax return for petitioner's father, who died in 1944 (R. 137a); that petitioner had given "no convincing or satisfactory explanation" why, if he had such a hoard, he found it necessary to borrow a substantial amount in 1954 (R. 153a); and it noted the contradictions between petitioner's earlier and later statements to the Internal Revenue agents as to the source of the funds with which he made his substantial purchases of antiques and art objects (R. 156a).

The court, recognizing that the Commissioner has the burden of proving fraud by "clear and convincing evidence" (R. 144a, 145a), held that for the years 1947 through 1956 "Serri consistently omitted substantial amounts of gross income from his returns and

[4] In evaluating petitioner's credibility, the court properly considered that, on his plea of *nolo contendere*, he was convicted in 1954 of willful evasion of income tax (R. 141a, 156a). See *Masters* v. *Commissioner*, 243 F. 2d 335, 338 (C.A. 3).

[5] His father never earned as much as $2,000 a year, and his estate was less than $5,000, most of it in war bonds. His mother took in piecework and private sewing, and her average annual earnings were only slightly over $1,000. His brother, who was younger than taxpayer, worked for him during the late 1930's for $30 to $40 per week (R. 134a–137a, 154a, Supp. R. 85b).

that this omission was due to fraud with the intent to evade tax * * * (R. 157a).

The court of appeals, "find[ing] no error" "[o]n review of the record," affirmed *per curiam* for the reasons "so well stated" by the Tax Court (Pet. 30).

That decision was correct, and there is no occasion for further review of the factual questions which the petition presents. In holding that the Commissioner had proved fraud, the Tax Court applied the settled rule that the government established its case by showing that the taxpayer (1) consistently had unreported income, and (2) had inadequate books and records. The first element may be established by (a) showing an increase in net worth that substantially exceeds reported net income and (b) either negating the existence of any likely non-taxable source of the increase or showing a likely source thereof. *Holland* v. *United States,* 348 U.S. 121; *United States* v. *Massei,* 355 U.S. 595; *Shahadi* v. *Commissioner,* 266 F. 2d 495 (C.A. 3); *United States* v. *Adonis,* 221 F. 2d 717 (C.A. 3); *Goe* v. *Commissioner,* 198 F. 2d 851 (C.A. 3), certiorari denied, 344 U.S. 897; *Gatling* v. *Commissioner,* 286 F. 2d 139, 144–145 (C.A. 4); *Ferris* v. *Commissioner,* 317 F. 2d 333 (C.A. 2).

All the necessary elements of the offense were shown here. (1) During a ten-year period the petitioner consistently spent substantially more than he reported as income—almost a quarter of a million dollars more. (2) He had no meaningful records of his professional income and expenses. (3) The government negated the existence of the only source of the increase in net worth upon which the taxpayer relied—the alleged

family cash hoard. Having disproved that source, the government was not required affirmatively to show a probable source of the increase. *United States* v. *Massei, supra; United States* v. *Adonis,* supra. There is accordingly no occasion to consider petitioner's lengthy attack (Pet. 16–24) upon the Tax Court's finding (R. 125a) that petitioner "managed to see an average of 7 patients an hour"—a finding which, when read in the light of the other findings, would seem to suggest only that petitioner would have been able to see that many patients and which, in any event, was unnecessary to the Tax Court's decision, since it related solely to the probable source of petitioner's unreported income.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION.

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